No. 17-1011

In the
Supreme Court of the United States

BUDHA ISMAIL JAM, et al.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR *AMICI CURIAE* MEMBER COUNTRIES AND THE MULTILATERAL INVESTMENT GUARANTEE AGENCY IN SUPPORT OF RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Multilateral Investment Guarantee Agency is a multilateral development organization and a member of the World Bank Group. 181 member countries are shareholders of MIGA.

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STATEMENT OF INTEREST[1]

Amici are the Multilateral Investment Guarantee Agency ("MIGA") and member countries that belong to MIGA, the International Finance Corporation ("IFC"), and/or other international organizations. *Amici* offer the perspective of both international organizations and the member countries that comprise and support them. As such, *amici* are uniquely well positioned to speak to the understanding on which members agreed to form and/or join these organizations, to base them in the United States, and to continue to fund and otherwise participate in them. *Amici* also can speak to the destructive impact it would have on their membership and missions if the broad immunity that they have long been understood to enjoy under the International Organizations Immunities Act ("IOIA") were eliminated.

The member countries that have joined this brief as *amici* are the Islamic Republic of Afghanistan, the Republic of Austria, the People's Republic of Bangladesh, the Kingdom of Belgium, the Republic of Benin, the Federative Republic of Brazil, the Republic of Côte d'Ivoire, the Arab Republic of Egypt, the Republic of Guinea, the Republic of India, the Republic of Indonesia, the Republic of Kenya, the United Mexican States, the Islamic Republic of Pakistan, the

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

Republic of Peru, the Republic of Rwanda, and the Republic of Senegal.

SUMMARY OF ARGUMENT

When Congress enacted the International Organizations Immunities Act in 1945, it gave international organizations "the same immunity from suit ... as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. §288a(b). The Act also provided that this immunity could be adjusted by the President. *Id.* §288.

Congress enacted the IOIA on the heels of the formation of three of the world's most critical international organizations: the United Nations, the World Bank, and the International Monetary Fund. The founding documents of each of those organizations obligated member countries to ensure that their own domestic law immunized the organization from suit for activities within their borders. And that is precisely what the IOIA did; the Act conferred immunity upon these nascent international organizations, each of which was headquartered in the United States, by reference to the virtually absolute immunity from suit that foreign sovereigns enjoyed at the time that the statute was enacted. Indeed, there is no serious question that, in the immediate wake of the IOIA's passage, international organizations were granted virtually absolute immunity under the IOIA, subject only to whatever adjustments were made through their own waivers or by discrete decisions

involving particular circumstances made by the executive branch.

It is against the backdrop of virtually absolute immunity that sovereigns throughout the world agreed to allow the United States to host these international organizations. And over the coming years, countries proceeded to form and headquarter in the United States a myriad of other international organizations, including the International Finance Corporation ("IFC") in 1956 and the Multilateral Investment Guarantee Agency ("MIGA") in 1988. Just as the background understanding of broad immunity from suit animated these organizations' formation in general, and their location in the United States in particular, that immunity remains critical to their membership and missions today. Indeed, without independence from the undue control or influence of any one member (including any one member's court system), international organizations would not be able to attract the broad membership that they presently enjoy, or to raise the capital that is essential to their ability to achieve their objectives.

Notwithstanding the undisputed fact that international organizations enjoyed broad immunity in the immediate wake of IOIA's passage, petitioners now contend that the immunity of international organizations was radically contracted when Congress enacted a different statute, the Foreign Sovereign Immunities Act of 1976 ("FSIA"), that says next to nothing about the immunity of international organizations. No one made the argument that petitioners now advance in 1976 when the FSIA was being debated in Congress or otherwise put

international organizations on notice that their IOIA immunity was at grave risk. And with good reason, as the argument makes little sense given the distinct nature of international organizations, whose member countries work as part of a collective body and continue to need the broad immunity the United States promised in 1945.

There is no better illustration of that than the context in which this case arises. According to petitioners, the FSIA subjects international organizations to the same exception to immunity for their "commercial activities" to which foreign sovereigns are subject under the FSIA. That exception is reasonable and relatively narrow when it comes to foreign sovereigns, which typically engage in far more functions as a sovereign than as a commercial actor. The exception also applies equitably to all sovereigns, which almost without exception engage in some commercial activity and much more sovereign activity. But as applied to international organizations, and particularly those organizations that, like the IFC and MIGA, engage principally in activities that could be characterized as "commercial," a "commercial activity" exception could have a radically different effect on organizations depending on their mission and in many important instances could swallow IOIA immunity whole. Indeed, at least by petitioners' telling, it is hard to imagine what activities by organizations like the IFC and MIGA would *not* qualify as commercial.

That result is fundamentally inconsistent with the statutory background against which member countries founded international organizations, agreed to headquarter them in the United States, and have

continued to fund and otherwise participate in them. The IOIA gave international organizations and their member countries every reason to believe that the immunity of international organizations would remain intact, subject only to waiver by the organization or action by the executive branch. By its plain terms, the IOIA expressly leaves to the President sensitive decisions about whether and how to alter or withhold the otherwise virtually absolute immunity that the statute confers.

There is thus no need to look to the evolving law of foreign sovereign immunity to ensure that the IOIA remains a "dynamic" statute. Congress already accomplished that task by granting the President that power—a power that the FSIA certainly does not purport to curtail. Moreover, international organizations and their member countries are well experienced with dealing with the executive branch, which is the principal organ of the U.S. government in diplomatic relations with both international organizations and foreign nations. It makes far more sense to leave any changes in the scope of international organization immunity to those diplomatic discussions than to have them turn on subsequent legislation addressing a different subject. And maintaining the broad immunity codified in the IOIA best supports the critical missions of international organizations and their member countries.

ARGUMENT

I. Broad Immunity Best Reflects And Protects The Interests And Policy Objectives Of International Organizations And Their Members.

When Congress enacted the IOIA in 1945 and gave international organizations "the same immunity from suit ... as is enjoyed by foreign governments," 22 U.S.C. §288a(b), foreign governments enjoyed virtually absolute immunity in the courts of the United States. *See Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004); Notes, *Jurisdictional Immunities of Intergovernmental Organizations*, 91 Yale L. J. 1167, 1171 (1982) ("In 1945 ... foreign governments were absolutely immune from the jurisdiction of both state and federal courts in the United States."). Under the "classical or absolute" theory of sovereign immunity that governed at the time, a sovereign could not, "without his consent, be made a respondent in the courts of another sovereign." *Altmann*, 541 U.S. at 690. Accordingly, absent their own waivers or a contrary decision by the executive branch, foreign sovereigns could not be sued in U.S. courts. Thus, it is beyond dispute that when Congress enacted the IOIA in 1945, what it conferred on international organizations was a virtually absolute immunity from suit.

That same virtually absolute immunity is precisely what international organizations and their members understood the IOIA to confer. And it is against the backdrop of that broad immunity that many such organizations, and their member countries, decided to house those organizations in the

United States. That broad immunity, moreover, is what every signatory country, including the United States, promised when the critical post-World-War-II international organizations were formed. And that broad immunity remains critical to ensuring the continued independence, funding, and operation of those organizations today.

A. Member Countries Formed and Continue to Participate in International Organizations Against a Backdrop of Broad Immunity.

Since the end of World War II, when the United States and its allies combined to form the World Bank and the United Nations, sovereign nations have formed and joined a whole host of international organizations on the understanding that those organizations would enjoy virtually absolute immunity from suit in the courts of the United States (and elsewhere). Indeed, the IOIA itself was a product of exactly that understanding, and its codification of the traditional, broad conception of immunity that governed at the time was the backdrop against which member countries agreed to locate many international organizations—including the UN, the World Bank, the IMF, the IFC, and MIGA—in the United States.

As World War II came to a close, the United States hosted two conferences that resulted in what continue to be some of the world's most critical international organizations: the Bretton Woods Conference in Bretton Woods, New Hampshire, which produced the IMF and the World Bank; and the San Francisco Conference, which produced the UN. More than 700 delegates from more than 40 allied nations gathered

at Bretton Woods in July 1944 to discuss the regulation of international monetary and financial order. And they ultimately created the IMF and the World Bank, institutions that would play an indispensable role in repairing the economic destruction that the war had wrought.

In the Articles of Agreement that they formed for the IMF, the delegates devoted an entire Article to "Status, Immunities and Privileges." *See* Articles of Agreement of the Int'l Monetary Fund, Art. IX, §§1-10, Dec. 27, 1945, 2 U.N.T.S. 40, 72-74 ("IMF Articles of Agreement"). That Article specifically provided that, "[t]o enable the Fund to fulfill the functions with which it is entrusted, ... [t]he Fund shall possess full juridical personality," and "[t]he Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract." *Id.* §§1-3.[2] The Article also expressly obligated each member country to "take such action as is necessary in its own territories for

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[2] In addition to immunity from suit, the Articles also establish immunities insulating "[p]roperty and assets of the Fund, wherever located and by whomsoever held, ... from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action," *id.* §4; immunity of the Fund's archives, *id.* §5; freedom of the Fund's archives from "restrictions, regulations, controls and moratoria of any nature," *id.* §6; privileges for the Fund's "official communications," *id.* §7; broad immunities and privileges for the Fund's officers and employees (including "[a]ll governors, executive directors, alternates, officers and employees of the Fund"), *id.* §8; and immunity "from all taxation and from all customs duties," *id.* §9.

the purpose of making effective in terms of its own law the principles set forth in this Article." *Id.* §10.

The UN's charter, which resulted from the 1945 San Francisco Conference, likewise obligated members to confer absolute immunity on the UN with respect to fulfillment of its functions. *See* Charter of the United Nations (June 26, 1945), Article 105 ("The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes."). The originating documents of these foundational international organizations thus not only made clear what kind of immunity they needed to fulfill their missions, but also imposed a concrete international law obligation on the United States and other member countries to ensure that their own domestic law conformed with that obligation and conferred broad immunity on the organizations.

As the United States itself recognized at the time, that obligation was particularly critical for any nation that hoped to host an international organization. Following the San Francisco Conference, the Secretary of State explained that because the UN would be governed by and funded by contributions from "all of the member states," it should "clearly not [be] subject to the jurisdiction or control of any one of them." Edward Reilly Stettinius Jr., U.S. Dep't of State, Pub. No. 2349, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference* 159 (June 26, 1945). And the United States assured the world community that it "share[d] the interest of all Members in seeing that no state hampers the work of the [o]rganization[s]

through the imposition of unnecessary local burdens." *Id.*

The United States ratified the IMF Articles of Agreement in July 1945, and it ratified the UN Charter in October 1945. Two months later, on December 29, 1945, Congress enacted the IOIA, which conferred on international organizations "the same immunity from suit ... as is enjoyed by foreign governments." 22 U.S.C. §288a(b). As the IOIA's legislative history explains, Congress intended the statute to assure the world that international organizations of all stripes would have broad immunity in the United States. As the Senate Report explained, "[w]hile the need for such legislation has existed for some time, the problem has become of pressing importance only in the last few years in connection with the increased activities of the United States in relation to international organizations" and, in particular, "in the international conferences in connection with the creation of UNRRA, the International Monetary Fund and International Bank, the Food and Agriculture Organization of the United Nations, and others." S. Rep. No. 79-861, at 2 (1945).

The Senate Report also specifically discussed how the IOIA "would be an important indication of the desire of the United States to facilitate fully the functioning of international organizations in this country" (*i.e.*, in the United States). *Id.* at 2-3. Indeed, the legislative history is replete with discussion of the need to assure broad immunity to encourage other countries to house international organizations in the United States. *See, e.g.*, 91 Cong. Rec. 10,866 (1945)

(statement of Rep. Cooper) ("[I]f we are to hope to have the United Nations Organization's headquarters to be located in the United States, it will be absolutely essential for [some form of immunity-granting] legislation to be passed."); H.R. Rep. No. 79-1203, at 2 (1945) ("[T]he probability that the United Nations Organization may establish its headquarters in this country, and the practical certainty in any case that it would carry on certain activities in this country, makes it essential to adopt this type of legislation promptly.").

Particularly when viewed against that backdrop, there can be no serious dispute that member countries agreed to let the United States host organizations like the UN, the World Bank, and the World Bank's affiliated international organizations on the understanding that the IOIA conferred upon international organizations virtually absolute immunity from suit. For one thing, that was plainly the "immunity from suit ... enjoyed by foreign governments" at the time, 22 U.S.C. §288a(b), as the "classical or absolute" theory of sovereign immunity governed in the United States until 1952. *See Altmann*, 541 U.S. at 690. Moreover, the legislative history just discussed confirms that the United States repeatedly informed the world that it enacted the IOIA to ensure that all international organizations would have the broad immunities and privileges necessary to enable those organizations to fulfill their functions.

Since the IOIA's enactment, the foundational documents and understanding that led to the location of the bedrock post-war international organizations

have not changed. Moreover, the foundational documents of other international organizations based in the United States have continued to reflect a felt need for virtually absolute immunity, not some abstract interest in parity with sovereign immunity. The IFC's Articles of Agreement, for example, include an Article on "Status, Immunities and Privileges" that establishes broad immunity "[t]o enable the Corporation to fulfill the functions with which it is entrusted" and provides that those "status, immunities and privileges ... shall be accorded to the Corporation in the territories of each member." Articles of Agreement of the Int'l Finance Corp., Art. VI, §1, May 25, 1955, 264 U.N.T.S. 118, 142 ("IFC Articles of Agreement"); *see also id.* §§2-11. MIGA's articles-of-agreement equivalent likewise includes a chapter on "Privileges and Immunities" that establishes broad immunity "[t]o enable the Agency to fulfill its functions" and provides that those "immunities and privileges ... shall be accorded to the Agency in the territories of each member." Convention Establishing the Multilateral Investment Guarantee Agency, Ch. VII, Art. 43, Oct. 11, 1985, 1508 U.N.T.S. 99, 114 ("MIGA Convention"); *see also id.* Arts. 44-50.

It is hard to believe that the 180-plus nations that comprise these organizations would have agreed to allow the United States to host them had they understood the immunity granted by the IOIA to be subject to the kinds of broad exemptions contained in the FSIA. That is particularly true as to organizations like the World Bank, the IFC, the IMF, the Inter-American Development Bank, the Inter-American Investment Corporation, and MIGA, which employ commercial means for their missions of international

development. Under the FSIA's "commercial activity" exception, "[a] foreign state shall not be immune" from any suit based on (1) "a commercial activity carried on in the United States by the foreign state," (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or (3) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. §1605(a)(2).

In the context of the foreign sovereigns that are the repeated and emphatic subject of that provision, the commercial activity exception reflects that commercial activities are different from the core sovereign activities that are essential to a nation. And, in practice, such an exception may be significant, but it is hardly devastating, as most sovereigns engage principally in sovereign activity, not commercial activity financed by a consortium of sovereigns after internal political negotiation by member countries, in furtherance of the global public good. But when that same exception is applied to an international organization designed to facilitate international development through commercial activity, such an exemption would go to the very essence and *raison d'etre* of the organization and threaten to undermine the protection offered by its immunity.

After all, some of the earliest organizations to receive immunity under the IOIA are ones that routinely engage in what may be deemed as commercial activities. For instance, the World Bank and the IMF were designated international organizations by executive order in 1946, Exec. Ord.

No. 9,751 (July 11, 1946), and the IFC followed not long after in 1956, Exec. Order No. 10,680, 21 Fed. Reg. 7647 (Oct. 2, 1956). And MIGA was designated by executive order upon its creation in 1988—more than a decade after the FSIA was enacted. *See* Exec. Order No. 12,647 (Aug. 2, 1988). Each of these organizations has as its core mission things that petitioners characterize as "commercial activity" for purposes of the FSIA. *See* 28 U.S.C. §1605(a)(2).

The IMF's mission is "[t]o promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems," IMF Articles of Agreement, Art. I, and MIGA's mission is "to encourage the flow of investments for productive purposes among member countries, and in particular to developing member countries," MIGA Convention, Ch. I, Art. 2. Likewise, the IFC's mission is "to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas." IFC Articles of Agreement, Art. I. To that end, its primary activities include "assist[ing] in financing the establishment, improvement and expansion of productive private enterprises which would contribute to the development of its member countries by making investments"; "bring[ing] together investment opportunities, domestic and foreign private capital, and experienced management"; and "stimulat[ing], and ... creat[ing] conditions conducive to, the flow of private capital, domestic and foreign, into productive investment in member countries." *Id.* Again, by petitioners' telling, all of these activities that lie at the

core of these organizations' missions would be excluded from IOIA's otherwise stable, uniform, and predictably broad immunity by virtue of the FSIA's "commercial activity" exception.

To be sure, arguments can be made that activities in furtherance of an international organization's core mission are outside the scope of what Congress had in mind when it enacted the "commercial activity" exception to the FSIA. *See* IFC Br. 50-60. But such arguments confirm that the Congress that enacted the FSIA was not legislating with the specific functions and immunity needs of international organizations in mind. In all events, it is hard to believe that more than 180 nations would have agreed to allow the United States to host these essential organizations on the hope that they could convince a court to read an exception into the FSIA's exception for commercial activities for international organizations whose core mission is commercial. That is particularly so given the background understanding of broad immunity against which so many international organizations were formed and housed in the United States.

B. International Organization Immunity Serves Critical Purposes That Are Distinct From the Purposes of Foreign Sovereign Immunity.

The understanding that the IOIA confers traditional, virtually absolute immunity, rather than pursuing some misplaced parity rationale and forever tying the immunity of international organizations to that of sovereign nations, is reinforced by the distinct purposes that international organization immunity and sovereign immunity are intended to serve.

While "both states and international organizations are well-established subjects of international law," the reasons for granting immunity to international organizations are "dissimilar to those underlying state immunity, or diplomatic immunity." Eric De Brabandere, *Immunity of International Organizations in Post-Conflict International Administrations*, 7 Int'l Orgs. L. Rev. 79, 82-83 (2010); *see also* Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* 352-65 (Oxford University Press 2018). And those distinct reasons have given international organizations and their member countries every reason to believe that international organization immunity would continue to be broad, and would continue to be governed by the distinct statute that Congress enacted for the specific purpose of dealing with international organizations, not by an entirely separate statute that deals only with foreign sovereign immunity and says next to nothing about international organizations.

State immunity and the related diplomatic immunity generally stem from principles of sovereign equality of states and non-intervention in the internal affairs of other states. *Immunity of International Organizations*, 7 Int'l Orgs. L. Rev. at 83. Immunity for international organizations and their staff, by contrast, is more functional, *i.e.*, it is essential to their ability to attract and retain members and achieve their missions. International organizations are not themselves sovereigns, but they are composed of multiple—indeed, often a multitude of—sovereigns. The IFC and the IMF have 189 member countries; MIGA has 181. Each of these members has unique

sovereign interests, and the nature and level of their participation in these organizations varies immensely. Moreover, while there are plenty of international organizations, such as the UN and the Organization of American States, that have quasi-sovereign functions, there are many others, like the IFC and MIGA, that engage principally in commercial or other types of activities. That combination of factors makes broad immunity from suit critical to the ability of these organizations to function in a way that ensures that no sovereign can exercise undue leverage over the actions of the collective through the withdrawal of immunity, and makes wholly inappropriate significant exceptions for subject matters that could correspond with an organization's principal function.

First, 180-some member countries are far less likely to agree to take part in an organization as to which a single member enjoys considerable advantages over others. That concern is particularly pronounced as to the host state. Given its physical proximity to the organization, the host state could claim the power to assert jurisdiction over nearly everything an international organization does. But it "would clearly compromise the independence of the organization if it could be subjected to pressure for the official (judicial) institutions of the host state." *Immunity of International Organizations*, 7 Int'l Orgs. L. Rev. at 88. Accordingly, "ensur[ing] that the host state cannot exercise any influence over the organization is fundamental in contributing to the maintenance of the sovereign equality of states," and to guarding against "unilateral control by one or more states of the organization." *Id.* at 85. And that

independence is best ensured by broad immunity from suit.

Moreover, precisely because such organizations consist of member countries, holding an international organization "liable" for monetary damages poses distinct complications. Many organizations (particularly those like the IMF, the IFC, and MIGA that have as their core missions stimulating economic growth in developing countries) have some members who principally fund their activities, and others who principally benefit from them. Member countries that serve principally as contributors are much less likely to continue to fund those missions if they must contribute not only to the costs of accomplishing them, but to the costs of fending off lawsuits.

That is all the more true given that, unlike when it is making a unilateral investment, a contributing country may not have complete control over the projects in which the organization chooses to invest its funds, let alone the methods by which the organization does so. That is what makes absolute immunity from suit—and particularly immunity for commercial activities—so critical to the ability of international organizations "to fulfill the functions with which [they are] entrusted." IFC Articles of Agreement, Art. VI, §1. The delicate internal process of diplomacy, which reflects the intricate balance of powers at play in these organizations, is a far superior measure to the blunt instrument of resolution of these questions through one country's judicial system. *See* Br. of *Amici Curiae* Former Exec. Branch Att'ys in Supp. of Resp't.

It is no answer to suggest that many lawsuits against international organizations would ultimately

be dismissed as meritless. Even meritless litigation is incredibly costly, and time- and cost-intensive lawsuits impose considerable settlement pressure. Moreover, the complications that inevitably attend international disputes have a tendency to exacerbate these problems. To take a recent example, it took *15 years* and a trip to this Court to achieve dismissal in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), and many other suits involving international conduct have dragged on just as long (or settled for exorbitant amounts). More fundamentally, "national courts are simply not the appropriate *fora* to deal with claims brought against international organizations," which often implicate sensitive foreign relations concerns. *Immunity of International Organizations*, 7 Int'l Orgs. L. Rev. at 85.

Consistent with these dynamics, the articles of formation of international organizations routinely emphasize that broad immunity is critical to the organization's ability "to fulfill the functions with which it is entrusted." IFC Articles of Agreement, Art. VI, §1; *see also, e.g.*, IMF Articles of Agreement, Art. IX, §1 (establishing broad immunity "[t]o enable the Fund to fulfill the functions with which it is entrusted"); MIGA Convention, Ch. VII, Art. 43 (establishing broad immunity "[t]o enable the Agency to fulfill its functions" and provides that those "immunities and privileges ... shall be accorded to the Agency in the territories of each member"). As those and other comparable statements confirm, both international organizations and their member countries have long understood the immunity that such organizations enjoy to cover all of the core functions that they serve.

That broad immunity from suit is essential to preserve the independence of the organization, and to ensure that it will be able to function as a cohesive unit, without fear of undue interference or judicial reprisal by a single member country. That is all the more evident in our increasingly global world. International organizations "are indispensable in a world in which problems and potentials extend beyond individual nations." *Jurisdictional Immunities*, 91 Yale L. J. at 1183. Yet as the missions and undertakings of international organizations become ever more "comprehensive," *Immunity of International Organizations*, 7 Int'l Orgs. L. Rev. at 80, the potential exposure to litigation becomes ever more expansive (and expensive). As their own founding documents reflect, without broad immunity from such litigation, international organizations simply cannot continue to function as they do, or to marshal the resources of a consortium of member countries to act collectively to further the global public good.

II. Congress' Decision To Grant The Executive Branch The Power To Alter International Organization Immunity Reinforces The Understanding That The IOIA Creates A Baseline Of Broad Immunity.

The longstanding understanding that the IOIA confers virtually absolute immunity is eminently reasonable, as that is the understanding reflected in the statute itself. Petitioners seek to portray the IOIA as reflecting a congressional intent to create a parity between international organization immunity and foreign sovereign immunity, such that the mechanism

for adjusting international organization immunity would come through subsequent congressional modifications of foreign sovereign immunity. The text of the IOIA tells a different story. Indeed, the IOIA expressly identifies the mechanism through which the 1945 Congress intended to deal with changes in the appropriate scope of international organization immunity: The statute gives the President the power "to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided ... or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity." 22 U.S.C. §288. And the statute empowers the President "to revoke the designation of any international organization" entirely for "abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities provided." *Id.*

Petitioners' attempt to convert this case into a choice between a "static" IOIA (with immunity fixed in 1945) and a "dynamic" one (where international organization immunity shifts along with foreign sovereign immunity) thus presents a false dichotomy. There is no need to look to the FSIA or anything else to avoid "lock[ing] in a rule that international organizations [a]re entitled to absolute immunity from suit." Petrs' Br. 36. The IOIA itself already creates all the flexibility Congress intended by giving the executive branch broad authority to withhold, condition, or revoke the otherwise-absolute immunity of international organizations and their officers and employees. That "built-in mechanism for updating the IOIA undermines [petitioners] claim that Congress

intended a different updating mechanism"—*i.e.*, reference to "developments in the law governing the immunity of foreign sovereigns." *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998); *see also Jurisdictional Immunities*, 91 Yale L. J. at 1170 ("the IOIA itself was carefully structured to provide broad and flexible controls for the immunities it conferred, including Presidential power unilaterally to modify or revoke them").

Congress' decision to delegate responsibility for adjusting international organization immunity to the executive branch is eminently sensible, as it is the executive branch that is principally tasked with dealing with the foreign relations dynamics that such issues present. *Cf. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085-86 (2015). Indeed, international organizations and their member countries are well experienced with dealing with the executive branch, as that is the principal organ of the U.S. government in diplomatic relations with both international organizations and foreign nations. It makes far more sense, and is far more consistent with member-country expectations, to leave any changes in the scope of international organization immunity to diplomatic discussions than to have them turn on subsequent legislation addressing a different subject.

Congress' decision to leave changes to the scope of international organization immunity to the President also belies petitioners' claim that the IOIA incorporates the entire body of foreign sovereign immunity law, as opposed to the substantive rule of immunity that governed at the time. Before the FSIA, "initial responsibility for deciding questions of

sovereign immunity fell primarily upon the Executive." *Altmann*, 541 U.S. at 690. Accordingly, if the IOIA really did just make international organizations equivalent to foreign sovereigns in all respects, then there would have been no need for Congress to specify that the President could withhold, constrain, or revoke the immunity of an international organization, as the President already would have had that power. Congress' felt need to grant the President that power underscores its intention to incorporate into the IOIA a *substantive* rule of virtually absolute immunity. As previously noted, the reference to the then-extent rule of virtually absolute foreign sovereign immunity was a useful way of enacting that substantive rule. But Congress' evident intent was to confer virtually absolute immunity on international organizations, not to establish a rule of parity for parity's sake.

Petitioners protest that the §288 power was intended only to allow "the President to police abuses of official status," not to serve "as a mechanism for updating the background rules applicable to international organization immunity." Petrs' Br. 30, 34-35 (citing 91 Cong. Rec. 12,530 (1945)) (noting that President "can withdraw the privileges from the employees of [a] foreign organization" that "starts functioning here and goes beyond the scope for which it was created"). Seventy years of historical practice proves otherwise. Presidents have routinely invoked §288 to carve out particular activities or assets of an international organization, without regard to any "abuse" by the organization or its members. *See, e.g.*, Exec. Ord. No. 13,042 (Apr. 9, 1997) (designating World Trade Organization but limiting its

immunities). Indeed, petitioners themselves cite several executive orders that constrained immunity in situations where there was no indication of "abuse" or "unauthorized activity." *See* Petrs' Br. 30 n.5.[3]

More fundamentally, petitioners' concession that Congress intended international organizations to have immunity for the core purposes for which they were created is fatal to their attempt to graft the FSIA onto the IOIA, for the FSIA exceptions that petitioners would impose on international organizations could virtually eliminate many such organizations' immunities under the IOIA. Presidents have long conferred immunity under the IOIA on international organizations that use commercial means to achieve their global objectives. *See supra* pp.12-14. Yet by petitioners' telling, the FSIA could swallow those IOIA immunities whole.

That result makes no sense. There is nothing in the IOIA indicating that Congress intended to draw a distinction between organizations that engage in principally "sovereign" activities and organizations that engage in principally "commercial" ones. Nor is there anything indicating that Congress intended the scope of the immunity conferred by the IOIA to turn

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[3] Citing Exec. Ord. No. 12,425 (June 16, 1983) (designating INTERPOL but limiting its immunities); Exec. Ord. No. 12,359 (Apr. 22, 1982) (designating International Food Policy Research Institute but limiting its immunities); Exec. Ord. No. 11,718 (May 14, 1973) (designating International Telecommunications Satellite Organization but limiting its immunities); Exec. Ord. No. 11,059 (Oct. 23, 1962) (designating Inter-American Tropical Tuna Commission, Great Lakes Fishery Commission, and International Pacific Halibut Commission but limiting their immunities).

on the nature or mission of the organization in question. Instead, IOIA's statutory language plainly reflects Congress' intention to allow the President to make sensitive decisions about whether an organization or its activities warrants a departure from the default rule of virtually absolute immunity that the IOIA creates. *See* 22 U.S.C. §288; S. Rep. No. 79-861, at 2 (1945) (explaining that IOIA gives President the power to "adjust[] or limit[] ... the privileges" of international organizations).

Interpreting the FSIA to abrogate immunities conferred by a statute enacted more than *30 years* earlier would be all the more problematic because the later-enacted FSIA says nothing at all about the immunity of international organizations. The FSIA does not "declare the meaning of earlier law"; does not "seek to clarify an earlier enacted general term"; does not "depend for [its] effectiveness upon clarification, or a change in the meaning of an earlier statute"; and certainly does not "reflect any direct focus by Congress upon the meaning of the earlier enacted provisions." *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998). And there is nothing in the legislative history even hinting at the notion that Congress understood the FSIA to curtail the immunity of international organizations. Nor would that have made any sense given the distinct purposes that international organization and sovereign immunity serve. *See supra* Part I.B.

Indeed, to the extent the FSIA sheds any light at all on the subject, it affirmatively undermines petitioners' position that the FSIA was intended to constrict international organization immunity. The

FSIA references the IOIA a grand total of once, providing that the property of an international organization—including funds it seeks to disburse to a foreign nation—may not be subject to attachment or any other process to execute a judgment against a foreign nation. 28 U.S.C. §1611(a). Not only does that provision confirm that the FSIA is not intended to alter the scope of immunity under the IOIA; it also confirms that to the extent Congress was concerned with international organizations at all when it enacted the FSIA, its sole concern was with ensuring that the FSIA would not diminish the immunity of international organizations, even with respect to what may be deemed their commercial activities.

In sum, if this case boils down to a debate about what mechanism best provides for sufficiently "dynamic" adjustment of international organization immunity, Congress has already answered that question: The IOIA leaves it to the President to alter the scope of the immunity of international organization "in ... light of the functions performed by any such international organization." 22 U.S.C. §288. That decision makes eminent sense as a policy matter; it has garnered decades of reliance interests; and nothing in the FSIA purports to alter or repeal it.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the D.C. Circuit.

Respectfully submitted,

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